Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area	)))))	WC Docket No. 04-223

COMMENTS OF EARTHLINK, INC. AND NEW EDGE NETWORK, INC.

EarthLink, Inc. ("EarthLink") and its Competitive Local Exchange Carrier ("CLEC") subsidiary, New Edge Network, Inc. ("New Edge"), hereby file comments in support of the Petition for Modification of McLeodUSA Telecommunications Services, Inc. ("McLeod").[1] McLeod's Petition demonstrates that the "predictive judgment" on which the Commission based it decision to forbear from section 251(c)(3) in Omaha has been proven wrong. Since the *Omaha Forbearance Order*,[2] Qwest has curtailed wholesale access to its analog, DS0, DS1 or DS3-capacity facilities by refusing to make these facilities available on commercially reasonable terms. McLeod's experience demonstrates not only that the Commission must reinstate section 251(c)(3) unbundling in Omaha's wire centers under Section 10, but also that the Commission should not rely

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1 Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed July 23, 2007) ("McLeod Petition").

2 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order*, 20 FCC Rcd 19,415 (2005) ("*Omaha Forbearance Order*").

on such predictive judgments as a basis for the section 215(c)(3) forbearance sought by Verizon in six MSAs[3] and Qwest in four MSAs.[4]

Where the FCC grants forbearance based on a predictive judgment, and that predictive judgment is shown to be false, the Commission has an obligation under section 10 to reinstate the forborne regulations. Otherwise the public interest criterion required for forbearance cannot be legally satisfied and continued forbearance would violate the requirements of section 10. In the *Omaha Forbearance Order*, the Commission based its forbearance from section 251(c)(3) on predictive judgments that "market incentives will prompt [Qwest] to make its network available – at competitive rates and terms – for use in conjunction with competitors' own services and facilities"[5] and that "Qwest will not react to our decision here by curtailing wholesale access to its analog, DS0, DS1 or DS3-capacity facilities."[6] Recognizing that these predictions could be "too optimistic," the Commission promised to "monitor [their] accuracy," to "take appropriate action," and to "reconsider[] this forbearance ruling," if its predictions were proven were wrong.[7]

Accordingly, based on the considerable evidence provided by McLeod, the Commission has a duty to reconsider its forbearance ruling and take action to reinstate section 251(c)(3) pricing regulations in Omaha. Indeed, this duty arises directly from the

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[3] Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172 (filed Sept. 6, 2006) ("*Verizon Petitions*").

[4] Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97 (filed April 27, 2007) ("*Qwest Petitions*")..

[5] *Omaha Forbearance Order*, 20 FCC Rcd at 19,456 (¶ 83).

[6] *Id.* at 19,455 (¶ 79).

[7] *Id.* at 19,456 (¶ 83) & n.204.

public interest mandate at the heart of section 10.[8] In the *Omaha Forbearance Order*, the Commission's determination that forbearance was in the public interest – and, as a legal matter, satisfied section 10 – was premised on these predictive judgments. But once such predictions are proven false, continued forbearance cannot be in the public interest – and, as a legal matter, violates section 10. In other words, where a grant of forbearance is found to be in the public interest based on an incorrect predictive judgment, Section 10(a) compels the Commission to reinstate forborne regulations to meet the statutory public interest criteria.

Of course, it is well established that the Commission can make decisions based upon predictions about the future under conditions of imperfect information.[9] But, as the *Omaha Forbearance Order* and McLeod's petition aptly demonstrate, forbearance from section 251(c) must be an exercise grounded in the reality of what is actually happening in the market rather than overly optimistic predictive judgments. With respect to forbearance from section 251(c), the reality is that incumbent local exchange carriers are the monopoly supplier of the inputs on which their UNE-based competitors must rely and, thus, have the ability to squeeze these competitors out of the market. That was the basis for section 251(c) of the 1996 Telecommunications Act, and – as McLeod demonstrates – remains the case today. The Omaha experience makes plain that there is no basis to predict otherwise.

Indeed, in the forbearance context, the Commission can – and should – be particularly cautious in relying upon predictive judgments because a petitioner can

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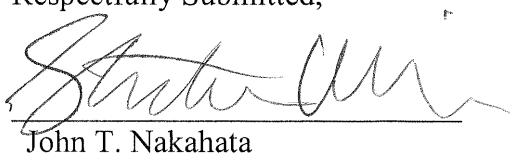
[8] *See* 47 U.S.C. § 160(a)(3).

[9] *See, e.g., Melcher v. FCC,* 134 F.3d 1143, 1151-52 (D.C. Cir. 1998) (explaining that the "FCC must make judgments about future market behavior with respect to a brand-new technology").

always reapply for forbearance once market conditions have in fact proved adequate. Acting in advance of adequate market provisions unnecessarily risks a grant of forbearance that is contrary to the public interest and, thus, a violation of section 10's requirements.

In the wake of the Omaha experience, therefore, the Commission must not rely on such predictive judgments as the basis for granting the forbearance from section 251(c)(3) sought by Verizon in six MSAs or Qwest in four MSAs. If it obtains the forbearance from section 251(c) sought in its recent petition, Qwest's curtailment of UNE- based providers' access to facilities on commercially reasonable terms in Omaha will be replicated in Seattle, Phoenix, Minneapolis, and Denver. Likewise, absent a section 251(c)(3) obligation, Verizon has no more incentive than Qwest does in Omaha to offer commercially reasonable alternatives to the section 251(c)(3) copper loops in Boston, Providence, New York, Philadelphia, Pittsburgh, and Virginia Beach. In evaluating the Verizon and Qwest petitions, the Commission must account for the realities of the market rather than relying on predictive judgments.

Respectfully Submitted,



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